

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 October 2012

Public Authority: Financial Services Authority
Address: 25 The North Colonnade
Canary Wharf
London
E14 5HS

Decision (including any steps ordered)

1. The complainant requested copies of correspondence between the Financial Services Authority ("FSA") and the Skipton Building Society concerning the raising of interest rates for some of its mortgage holders above a guaranteed maximum. The FSA withheld information under sections 40(2), 43(2) and 44.
2. The Commissioner's decision is that FSA has correctly applied sections 40(2), 43(2) and 44 to the information that it has withheld. The Commissioner does not therefore require the FSA to take any further steps to ensure compliance with the legislation.

Request and response

3. On 23 November 2011, the complainant wrote to the FSA and requested information in the following terms:

"On 20 Jan 2010 the Skipton Building Society raised my and other mortgage holders Standard Variable Mortgage Rate by removing a guarantee built into my mortgage that the rate would never be 3% above Bank of England base rate. This resulted in mortgage rate rising from 3.5% to 4.95% ...

In subsequent correspondence with the Skipton and its Chief Executive Mr David Cutter he claimed in a letter dated 14 Mar 2011 that the Skipton has "consulted with the FSA" / "the FSA was aware of this change prior to it being made and have not raised any objections on the matter"

I would therefore request copies of all correspondence that passed between the FSA and the Skipton Building Society as regards the removal of the guarantee on (my) Skipton Mortgage Holders."

4. The FSA responded on 20 October 2011. It did not disclose the requested information. It applied section 40(2), 43(2) and 44.
5. Following an internal review the FSA wrote to the complainant on 20 February 2012. It disclosed some information but confirmed its original decision to withhold the remainder under sections 40(2), 43(2) and 44.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically he complained about the FSA's decision not to disclose all of the information that he requested.
7. The Commissioner considered whether the FSA was correct to withhold information under sections 40(2), 43(2) and 44.

Reasons for decision

Scope of the request

8. During the course of the Commissioner's investigation, the FSA provided him with copies of information that had been withheld from the complainant. This consisted of correspondence between the Skipton Building Society and the FSA which took place prior to the society issuing its letter to some of its mortgage holders about the increase of interest rates above a guaranteed maximum. The FSA argued that this information was exempt from disclosure under sections 40(2), 43 and 44.
9. The FSA also informed the Commissioner that it held correspondence from the Skipton Building Society from a period after the issuing of the letter to mortgage holders. This correspondence provided the FSA with updates in relation to issues such as the numbers and types of enquiries that the society had received from mortgage holders following the issuing of the letter. The FSA argued that this information was outside the scope of the complainant's request.
10. The FSA explained that, as with other requests, it considered the complainant's request in the context of the correspondence in which it

was contained. This context was the complainant's dissatisfaction with the fact that the FSA was aware of the Skipton Building Society's proposals to make changes to its guaranteed maximum mortgage interest rate and that it did not appear to have raised any objections to this.

11. In the FSA's view, it would be appropriate for the scope of the request to be limited to the point at which the Skipton Building Society issued its letter to mortgage holders about the change to mortgage interest rates. The information that it held after this date was simply information provided by the society about how mortgage holders were reacting to the change. This information was not part of the discussions with the Skipton Building Society about the change itself.
12. The FSA also pointed out to the Commissioner that, even if this information that it received from the society did fall within the scope of the request, it would be exempt from disclosure under section 44.
13. The complainant informed the Commissioner that he believed that the information that the FSA received from the Skipton Building Society after the issuing of its letter to mortgage holders clearly fell within the scope of his request, given how it was worded.
14. The Commissioner notes the FSA's arguments about the scope of the complainant's request. He believes that it was reasonable for the FSA to take the view, from the context of the complainant's request, that he was seeking copies of correspondence containing substantive discussions about the changes to mortgage interest rates that the Skipton Building Society was proposing, rather than any correspondence about subsequent reactions from mortgage holders to that change. It appears from the context of the request that the complainant was trying to obtain details of any consultations that may have taken place prior to the society making changes to mortgage interest rates and details of any objections the FSA may have made to those proposed changes.
15. As a result the Commissioner has determined that the FSA's interpretation of the scope of the request, rather than the complainant's interpretation of the scope of the scope, was a reasonable objective reading of that request. He has therefore decided that the correspondence from the Skipton Building Society providing the FSA with updates on responses to its change to mortgage interest rates, subsequent to the issuing of its letter to mortgage holders, did not fall within the scope of the request.

Section 44(1)(a) – Statutory prohibition on disclosure

16. The FSA applied section 44(1)(a) to information that it received from the Skipton Building Society in relation to its revised approach to mortgage interest rates.
17. Section 44(1)(a) of the FOIA states that information is exempt if its disclosure is prohibited by or under enactment. The FSA argued that it is prohibited under section 348 of the Financial Services and Markets Act 2000 (“FSMA”) from the disclosure of ‘confidential information’ that it has received.
18. Section 348(1) states that:

“Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of –

(a) the person from whom the primary recipient obtained the information; and

(b) if different, the person to whom it relates.”
19. When considering if section 348 is applicable, the Commissioner is mindful of previous decisions of the Information Tribunal relating to the application of section 348 as a statutory prohibition on disclosure by the FSA, in particular *FSA v ICO (EA/2007/0093 & 0100)* and *Slann v FSA & ICO (EA/2005/0019)*.
20. The Commissioner has taken these Tribunal cases into account when considering this case. As a consequence he has considered the following:
 - (i) whether the FSA is a primary recipient of the information;
 - (ii) whether the request is for ‘confidential information’; and,
 - (iii) if so, whether there is consent to release the information or whether this could be obtained.

(i) Is the FSA a primary recipient?

21. A primary recipient is defined in section 348(5) of the FSMA. This definition includes the FSA. The Commissioner therefore considers the FSA to be a primary recipient for the purposes of the FSMA.

(ii) Is the request for confidential information?

22. Confidential information is defined in section 348(2) as information which:

- i. relates to the business or other affairs of any person;
- ii. was received by the primary recipient for the purposes of, or in the discharge of, any function of the authority; and
- iii. is not prevented from being confidential information by section 348(4).

23. The Commissioner therefore considered whether these criteria were met in relation to the withheld information.

(a) Does the information relate to business or other affairs of any person?

24. A person is not defined in section 348 of the FSMA so is taken as having its legal interpretation, that is any entity that is recognised as having legal personality to enter legal relations, for example, any person, a company, unincorporated association, partnership or sole trader.

25. The Commissioner considers the information does relate to the business or affairs of the Skipton Building Society as it is communications from the society to the FSA about its decision to change interest rates on its mortgage accounts.

(b) Was the information received by the primary recipient for the purposes of, or in discharge of, any of its functions?

26. The Commissioner considered whether the information was received by the FSA for the purposes of, or in discharge of, any of its functions.

27. Section 348(3) of the FSMA sets out that for information to be confidential information it does not matter whether the information was received by virtue of a requirement to provide it under the FSMA. The Commissioner's view is therefore that it does not matter if information was provided voluntarily to the FSA or under compulsion. The key issue is whether the FSA can demonstrate the function it was discharging when it received the information from the Skipton Building Society.

28. The FSA informed the Commissioner that some of the information that it holds is information that it received for the purpose of carrying out its functions under the Unfair Terms in Consumer Contract Regulations ("UTCCR"), as well as under the FSMA. Regulation 19 of the UTCCR deems its functions under the regulations as if they were functions of the FSA under the FSMA. It followed that correspondence from the Skipton Building Society had been received for the purposes of its regulation of the society under the UTCCR, as well as the FSMA, and so section 348 of the FSMA applied to that information.

29. Having reviewed the information to which section 44 has been applied, the Commissioner accepts that the FSA was fulfilling a regulatory function when receiving this information.

(c) Is the information prevented from being confidential by section 348(4)

30. Section 348(4) states that information cannot be confidential information if it has already been made available to the public. The Commissioner's view is that this is relevant only where information has already been made public without breaching the FSMA and he is not aware that the information withheld under this section has been made available to the public.
31. Section 348(4) also states that information cannot be confidential information if it can be summarised or framed in a way where it is not possible to ascertain information relating to another person (where person has its legal meaning and includes companies). Given the nature and purpose of the correspondence accepts that it would not be possible to anonymise the information.
32. In light of the above, the Commissioner has concluded that the withheld information is confidential information for the purposes of the FSMA.

(iii) If it is confidential information, is there consent to its release or can this be obtained?

33. Consent for disclosure would have to be obtained from the person from whom the FSA obtained the information, in this case the Skipton Building Society. The FSA has provided a copy of the correspondence with the society in which it refused to provide its consent to disclosure of the withheld information. The Commissioner consequently accepts the withheld information is confidential information, as defined in the FSMA, and cannot be disclosed under section 348.
34. The Commissioner therefore accepts that section 348 of the FSMA acts as a statutory prohibition on disclosure and the FSA has correctly applied section 44 of the FOIA to the information withheld under that section.

Section 43(2) – Prejudice to commercial interests

35. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person.
36. The FSA has argued that disclosure of the information withheld under section 43(2) would be likely to prejudice the commercial interests of the Skipton Building Society. The Commissioner notes that the FSA

consulted the society about the disclosure of this information and the FSA's arguments reflect the views of the society in terms of the likely prejudice to its commercial interests.

37. The information that was withheld was the FSA's correspondence with the Skipton Building Society which contained its detailed views on whether the society had complied with the UTCCR in relation to its decision to remove the ceiling on interest rates for its mortgage holders.

Engagement of section 43

38. The Commissioner initially considered whether the relevant criteria for the engagement of section 43(2) were satisfied.

(i) Applicable interest within the exemption

39. The Commissioner considered whether the prejudice claimed by the FSA is relevant to section 43(2). The FSA argued that there was a risk of litigation in relation to the Skipton Building Society's revised approach to interest rates. Disclosure of information extracted from its exchange with the society over the issue of that revised approach would be likely to increase the litigation risks facing the society. This in turn would be likely to generate negative publicity and absorb financial and human resources which would be harmful to its commercial interests.
40. The Commissioner accepts that the disclosure of the withheld information could lead, not only to an increased risk of litigation, but could result in further debate and comment about the Skipton Building Society's actions. Some of this debate and comment could be critical in nature which could lead to possible damage to its reputation. This would clearly be prejudicial to its commercial interests. The Commissioner is therefore satisfied that the potential prejudice that has been identified by the FSA relates to the commercial interests of the Skipton Building Society.

(ii) The nature of the prejudice

41. The Commissioner next went on to consider whether the prejudice being claimed was "real, actual or of substance" ie not trivial and whether there was a causal link between disclosure and the prejudice claimed. With regard to the first element, the Commissioner is satisfied that the prejudice being claimed is not trivial or insignificant.
42. With regard to the second element, the public authority needs to be able to establish that the disclosure of the information would be likely to lead to the harmful consequences claimed. The Commissioner, having examined the information withheld under this section, notes that it is part of a frank exchange of views between the FSA and the Skipton

Building Society as to the lawfulness of the society's removal of the standard variable rate ceiling in its mortgage contracts. The information to which section 43(2) has been applied comprises detailed views of the FSA on the applicability of the UTCCR to the society's decision. The Commissioner obviously cannot discuss this information in detail as to do so would reveal information that the FSA believes is exempt from disclosure.

43. The Commissioner understands that at the time of the request there was current and threatened litigation against the Skipton Building Society in relation to its decision to remove the standard variable rate ceiling. He accepts that the disclosure of the FSA's views on this decision, in terms of the society's compliance with the relevant legislation, could clearly have been harmful to the society if it appeared to suggest that there was any difference in views between the two parties over this issue. This could be harmful, not only in terms of any possible legal action that might be taken against the society, but in terms of its reputation more generally

(iii) The likelihood of prejudice

44. The FSA has argued that the disclosure of the withheld information would be likely to prejudice the commercial interests of the Skipton Building Society. In the case of *John Connor Press Associates Limited v The Information Commissioner* the Tribunal confirmed that, when determining whether prejudice would be likely to occur, the test to apply is that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.*" (para 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.
45. The Commissioner accepts, after reviewing the withheld information, that the disclosure of the FSA's views in its exchanges with the society over its revised approach to mortgage interest rates would result in a real and significant risk that the society would face an increased risk of negative publicity, possible litigation and potential damage to its reputation. This would clearly be harmful to its commercial interests.
46. The Commissioner, in consequence of the above, accepts that section 43(2) is engaged. As it is a qualified exemption, he went on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosing the information

47. The Commissioner recognises that there a general public interest in accountability and transparency in relation to the activities of public authorities. This is particular the case where the public body, the FSA, has the crucially important role in regulating the financial services industry in the UK.
48. The information that was requested relates to the Skipton Building Society's decision to remove the ceiling on interest rates for its mortgage holders. This had an adverse financial effect on many thousands of people and was the subject of considerable public discussion and debate. There is clearly a public interest in the disclosure of information which would shed light on the FSA's view of whether the decision by the society was in compliance with the relevant legislation.
49. The disclosure of the information would also provide the public with a greater insight in to approach adopted by the FSA in relation to the regulation of the unfair contract terms regime.
50. Additionally, disclosure would help to increase public understanding of the relationship between the FSA and the organisations that it regulates. It would allow the public to see how the FSA deals with concerns raised by consumers about organisations that it has responsibility for regulating.

Public interest arguments in favour of maintaining the exemption

51. The FSA argued that in the absence of the background information justifying the FSA's opinions, which it believed was exempt under section 44, those opinions, expressed as part of the correspondence, would be of limited value to the public. Further, it could lead to the FSA's opinions and views being misconstrued generally and could potentially mislead consumers and potential litigants.
52. It also argued that to operate effectively and in the public interest, a system of regulation had to be fair. Ad hoc publication of the FSA's previously unpublished views on issues raised with a regulated firm would be seen as unfair. This was understandable, as regulated firms are not themselves subject to the provisions of FOIA.
53. In the FSA's view, there was an expectation that the detailed exchanges between regulated firms and the FSA would take place in confidence. Loss of that confidence would undermine the FSA's ability to regulate effectively, because firms would become less open and candid in their dealing with it.

Balance of public interest arguments

54. The Commissioner acknowledges that there a public interest in disclosure. The actions of the Skipton Building Society attracted a lot of comment and there appears to be little explanation in the public domain of the role played by, and the views of, the FSA as the regulator of the financial services industry in relation to this issue. Consequently the Commissioner has given the arguments in favour of greater transparency and accountability particular weight, both in general and in the particular circumstances of this case.
55. The FSA argued that disclosure of the information could be misconstrued by the public if it was disclosed without the wider context provided by the information covered by the statutory bar. The Commissioner has not given this argument much weight as he believes that it would be open to the FSA to take steps to put the information, if it were disclosed, in context if it was felt that there was a risk of it being misconstrued.
56. However, despite the above, the Commissioner does accept that disclosure would be likely to prejudice the commercial interests of the Skipton Building Society. There is clearly a significant public interest in not disclosing information which may have an adverse effect on the commercial interests of any organisation.
57. In addition, the Commissioner accepts that the disclosure of the FSA's very detailed and frank exchanges with the Skipton Building Society over this issue would very likely lead not only to the Skipton Building Society being more reluctant to enter into such exchanges with it in future, but would be likely to lead to other organisations also being less willing to do so.
58. The Commissioner believes that there is a very significant public interest in the FSA being able to have free and frank discussions with organisations that it regulates, away from the glare of publicity, to ensure that it remains fully informed of all relevant issues and, where necessary, is able to influence those organisations in ways that it believes are appropriate. This helps to ensure that the FSA is able to effectively carry out its role as a regulator of the financial service sector.
59. After weighing the public interest arguments, the Commissioner has determined that the public interest factors in not prejudicing the commercial interests of the Skipton Building Society and allowing the FSA to be able to enter into free and frank discussions with organisations that it regulates, away from the public spotlight, outweigh the public interest factors in favour of disclosure. Consequently, he has decided that the FSA correctly applied section 43(2) to the information that it withheld.

Section 40(2) – Personal information

60. Section 40(2) provides an exemption for information which is the personal information of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
61. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (“DPA”). This is an absolute exemption and is therefore not subject to a public interest test.
62. The FSA has sought to rely upon this exemption to withhold the names, contact details and signatures of some of its staffs. The FSA argued that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA.

Does the withheld information constitute personal data?

63. In order to establish whether this exemption has been correctly applied the Commissioner first considered whether the withheld information is the personal data of third parties, in this case employees of the FSA. Personal data is defined in the DPA as information about a living individual who can be identified from that information, or from that information and other information in the possession of, or likely to come into the possession of, the data controller.
64. The withheld information is the names, contact details and signatures of employees of the FSA which appear on letters and emails to the Skipton Building Society. The Commissioner accepts that this information clearly relates to identifiable individuals and is also about those individuals. Therefore, the Commissioner is satisfied that this information is the personal data of the third parties, the FSA’s employees.
65. The fact that the information constitutes personal data does not automatically exclude it from disclosure. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
66. Having accepted that the requested information constitutes the personal data of living individuals, the Commissioner then considered whether disclosure would breach one of the data protection principles.

Would disclosure breach one of the Data Protection principles?

67. The Commissioner considered whether the disclosure of the withheld information would be a breach of the first principle of the DPA. The first

data protection principle requires that any disclosure of information is fair and lawful and that at least one of the conditions in schedule 2 of the DPA is met.

68. The Commissioner initially considered whether the disclosure of the withheld information would be fair. In doing this he took into account the following factors:

(i) the individuals' reasonable expectations of what would happen to their information;

(ii) whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned; and

(iii) whether the legitimate interests of the public in disclosure were sufficient to justify any negative impact to the rights and freedoms of the individuals concerned.

(i) Expectations of the individuals concerned

69. The Commissioner has considered the reasonable expectations of the individuals in terms of what would happen to their personal data. These expectations can be shaped by factors such as the individuals' general expectation of privacy and also the purpose for which they provided their personal data. When considering what information individuals should expect to have disclosed about them, the Commissioner considers that a distinction should be drawn as to whether the information relates to their public or private life. The Commissioner's view is that information which relates to an individual's private life (i.e. their home, family, social life or finances) will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).

70. The information withheld under section 40(2) is the names, contact details and signatures of some of the FSA's employees who were in correspondence with the Skipton Building Society about its proposed raising of mortgage rates. The Commissioner notes that the withheld information relates to the individuals in a professional capacity and there are no 'private' considerations

71. The Commissioner believes that employees of public authorities should be open to scrutiny and accountability and should expect that some personal data about them may be released because their jobs are funded by the public purse. He considers that the seniority of the individual acting in a public or official capacity should be taken into account when personal data about that person is being considered for disclosure under the FOIA. This is because the more senior a member of

staff is, the more likely it is that they will be responsible for making influential policy decisions and/or decisions relating to the expenditure of public funds. In previous decision notices the Commissioner has stated that he considers that occupants of senior public posts are more likely to be exposed to greater levels of scrutiny and accountability and that there should therefore be a greater expectation that some personal data may need to be disclosed in order to meet that need.

72. The Commissioner notes that in this case the FSA has released the name and contact details of a manager who was an acting Head of Department at the relevant time. However, it has withheld the names, contact details and signatures of staff who it has confirmed were junior employees.
73. The FSA has acknowledged that, as the junior employees had contact with external parties, in this case the Skipton Building Society, as part of their duties, it could be argued that they should expect some public awareness of their roles. However, the FSA pointed out that the provision of a name to a company during the course of dealing with a regulatory issue does not constitute disclosure to the world at large and simply allows those concerned with the issue at the company to make contact with the relevant individual.
74. The Commissioner accepts the FSA's argument that the names of its employees, their contact details and signatures should not be considered to have been placed in the public domain when they are provided to a company within the context of the investigation of a regulatory issue. In such circumstances names and other details are provided by individuals in their professional roles because this is what is expected of them in the context of communicating with an external party. He is therefore satisfied that although the individuals concerned may have had contact with an external stakeholder, the Skipton Building Society, they did not do so in a public facing role on behalf of the FSA. Consequently, it would be reasonable for the individuals concerned, as junior employees, to have an expectation that their names would not be disclosed to the public at large in the context of the FSA's engagement with the Skipton Building Society.
75. In relation to the signature of the acting Head of Department, whose name and contact details were disclosed by the FSA because of his seniority, the Commissioner notes that this was again provided in a communication with the Skipton Building Society in discussions about the same regulatory issues. He is not aware that this signature was in the public domain at the time of the request. Consequently, he is satisfied that it would have been reasonable for the individual concerned

to have an expectation that his signature would not be disclosed to the public at large.

(ii) Consequences of disclosure

76. Given that the information in this case relates to the regulation of the Skipton Building Society by the FSA, the Commissioner is not convinced that disclosure of the withheld personal data would be likely to cause significant distress or damage to the individuals concerned. However, he does accept that the disclosure of the names and contact details of the junior employees in connection with the issues related to the Skipton Building Society could result in increased communications directed to them from members of the public, for example seeking to obtain more information or to enter into discussions about those issues. As the number of people affected by the Skipton Building Society's decision to raise its mortgage interest rates was very large and it gave rise to a significant amount of public discussion, disclosure may have resulted in those employees being diverted from carrying out their normal duties.
77. In relation to the disclosure of individuals' signatures into the public domain, the Commissioner would have some concerns as to the purposes that such information could be used.

(iii) General principles of accountability and transparency

78. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure.
79. In considering 'legitimate interests', the Commissioner's view is that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
80. The Commissioner accepts that there is a general public interest in terms of the transparency and accountability of public sector organisations and specifically about how the FSA carries out its regulatory functions. It could be argued that the disclosure of the names of the FSA's junior staff, and possibly their contact details, would add to the transparency and accountability of its decision making process in relation to its dealings with the Skipton Building Society. However, it is difficult to identify the general public interest in the disclosure of individuals' signatures in this case.
81. The Commissioner believes that any public interest in disclosure must be weighed against potential prejudices to the rights, freedoms and legitimate interests of the FSA's employees. The Commissioner also

notes that the FSA's employees have not consented to disclosure and that it does not appear that any of the withheld information is in the public domain.

82. Taking into account the above, the Commissioner has concluded that the strength of the legitimate interest in disclosure is not sufficient to supersede the right of the data subjects, the FSA's employees, to privacy. This decision has been informed by his consideration of the reasonable expectations of the employees and the possible consequences of disclosure, as detailed above.
83. The Commissioner has therefore concluded that it would be unfair to disclose the withheld information as this would breach the first data protection principle. As he has determined that it would be unfair to disclose the requested information, it has not been necessary to go on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 of the DPA is met. He has therefore decided that the FSA has correctly applied section 40(2) to the information that it withheld under that section.

Right of appeal

84. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

85. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

86. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Rachael Cragg
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